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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATHAN WECHSLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This brief is submitted in reply to the brief of the United States of America.

ARGUMENT

I. Coram Nobis Relief Is Appropriate.

A writ of error *coram nobis* is available under the All-Writs Act, 28 U.S.C. § 1651(a), to correct errors "of the most fundamental character." *United States v. Morgan*, 346 U.S. 502, 512 (1954) (*quoting United States v. Mayer*, 235 U.S. 55 (1914)). *Coram nobis* is appropriate when an intervening change in the law renders non-

criminal the conduct for which a person was convicted.[1] *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974).

Mr. Wechsler does not, as the Government suggests, seek to relitigate issues he raised on direct appeal. He challenges his conviction on the basis that *Rewis v. United States*, 401 U.S. 808 (1971), renders the conduct for which he was convicted noncriminal. Mr. Wechsler could not have challenged his conviction based on *Rewis* during his direct appeal—*Rewis* was decided years after Mr. Wechsler's direct appeal was concluded.

Equally unavailing is the Government's argument that *coram nobis* is inappropriate here because *Rewis* did not limit the jurisdictional reach of the Travel Act, 18 U.S.C. 1952. As we demonstrate in our petition, seven Courts of Appeals have held otherwise. Pet. at 6-9. Those courts correctly read *Rewis* to hold that the Travel Act does not apply to conduct having only a minimal, incidental or fortuitous interstate connection. Indeed, the Government concedes that these decisions conflict with Fourth

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[1] The Government's reliance upon the Seventh Circuit's decision in *United States v. Keane*, 852 F.2d 199 (1988), *cert. denied*, 109 S. Ct. 2109 (1989), in an attempt to limit *coram nobis* is misplaced for two reasons. In *Keane* the Seventh Circuit based its holding on the petitioner's failure to demonstrate lingering collateral consequences from his conviction. 852 F.2d at 203-04. Mr. Wechsler, however, has never regained his right to vote or his professional licenses as an attorney and a C.P.A., which he lost as a result of his conviction. These collateral consequences are sufficient under both *Morgan* and *Keane*. *See United States v. Morgan*, 346 U.S. at 512-13; *United States v. Keane*, 852 F.2d at 203.

Moreover, *coram nobis* was denied in *Keane* because the indictment stated an offense after *McNally v. United States*, 483 U.S. 350 (1987), the change in the law upon which the petitioner relied. 852 F.2d at 204-06. In contrast, Mr. Wechsler's conviction was based upon interstate activity insufficient to confer Travel Act jurisdiction, so that the indictment of Mr. Wechsler could not possibly state a Travel Act offense.

and Fifth Circuit decisions adopting the narrow construction of *Rewis* the Government proposes. Opp. at 5-6.

II. The Conflict Among The Circuits On The Reach Of The Travel Act Extends To The Facts Of This Case.

Conceding a conflict among the circuits on the standard for determining Travel Act jurisdiction, the Government alleges that no conflict exists on the facts of this case. Opp. at 5-7. The Government argues that all circuits agree that any use of interstate banking facilities in a bribery scheme is sufficient to confer Travel Act jurisdiction. *Id.*

No such uniformity among the circuits exists. In each case the Government cites in support of its argument for expansive Travel Act jurisdiction, the use of interstate banking facilities was either essential to, or had a significant relationship to, the bribery scheme at issue, not the minimal, incidental or fortuitous interstate connection in this case. For example, in *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), a California corporation sent four checks drawn on its Michigan bank to its Illinois subsidiary to effectuate a bribe of Illinois public officials, and an officer of the parent travelled interstate in furtherance of the bribery scheme. The Seventh Circuit stressed that the California corporation had to somehow deliver the funds to Illinois and the use of checks was, therefore, essential to the California corporation's ability to bribe the Illinois officials.[2] 527 F.2d at 77.

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[2] The other cases cited by the Government likewise involve interstate activity of much greater magnitude than that involved in this case. *See United States v. Raineri*, 670 F.2d 702, 717-18 (7th Cir.), *cert. denied*, 459 U.S. 1035 (1982) (maintenance and regular use of an out-of-state bank account for expenses of a prostitution business has a significant relationship to the operation of the prostitution business); *United States v. Bursten*, 560 F.2d 779, 783-84 (7th Cir. 1977) (significant and essential use of Wisconsin

The jurisdictional predicate in this case for converting an offense which occurred entirely in Virginia into a federal felony could not be more minimal, incidental or fortuitous. The only interstate act was the deposit by a Virginia public official's secretary of a single check drawn on a Virginia bank in a District of Columbia bank two days after the Travel Act was enacted.[3] Unlike *Peskin* and the other cases cited by the Government, the clearance through interstate banking facilities of this check was neither essential to, nor significantly related to, this otherwise local offense.

The Government's attempt to distinguish two Seventh Circuit cases cited by Mr. Wechsler only highlights the conflict between the Fourth Circuit and other circuits. The first, *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), is almost factually identical to this case. Both cases involve unlawful activity solely in one state, payment by check in that same state, and the fortuitous clearance of a single check across state lines. In *Alto-*

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bank account by Wisconsin businesses to bribe Indiana officials gives rise to Travel Act jurisdiction); *United States v. Rauhoff*, 525 F.2d 1170, 1175 (7th Cir. 1975) (nine checks drawn on Arkansas bank account to effectuate bribe of Illinois officials by Arkansas company were significant and essential to the unlawful scheme and conferred Travel Act jurisdiction); *United States v. Hathaway*, 534 F.2d 386, 398 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976) (use of mails to forward several checks from Pennsylvania to Massachusetts and clearance of those checks from Massachusetts to Pennsylvania "was more than incidental, . . . for it was an important link in the interchange" in a bribing scheme).

[3] In its attempt to justify the sufficiency of the interstate connection in this case, the Government improperly considers checks other than Mr. Cotten's check, none of which cleared through interstate banking channels, and the interstate movement of Mr. Cotten's check, which the Government erroneously describes as from the District of Columbia to Virginia. Opp. at 6-7 & n.5. Each of those acts predated the enactment of the Travel Act and certainly cannot form the jurisdictional basis for application of the Travel Act.

bella, however, Justice Stevens, then a judge of the Seventh Circuit, held that such minimal and incidental interstate activity does not confer Travel Act jurisdiction. 442 F.2d at 315.

The other case the Government seeks to distinguish, *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), is no more factually distinguishable than *Altobella*. In *Isaacs*, the Seventh Circuit directly addressed the Fourth Circuit's decision on Mr. Wechsler's direct appeal, found the facts in *Isaacs* indistinguishable, and felt compelled to state that

> We are unable to agree with [the *Wechsler* court's] view of § 1952, however, not only because it assumes that the use of a single check crossing state lines may trigger § 1952, but also because it suggests that the check need not actually travel interstate. We cannot agree that the incidental use of a federally regulated banking facility furnishes the jurisdictional element of a § 1952 offense.

493 F.2d at 1149.

CONCLUSION

For the reasons discussed above, and in the petition, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated this 18th day of September, 1989.